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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 125

REUBEN KEMP, JR.,

Appellant,

against

WILLIAM S. HULTS, as Commissioner of the Department of Motor Vehicles of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
POINT I—This Court lacks jurisdiction under 28 U.S.C. § 1257(2) since the decision of the New York Court of Appeals did not sustain the validity of a state statute against a constitutional attack	5
POINT II—Appellee's rejection of the appellant's application for a driver's license does not raise a substantial federal question	7
Conclusion	14

CASES

California v. Zook, 336 U. S. 725	10
Clason v. Indiana, 306 U. S. 439	10
DeVeau v. Braisted, 5 N. Y. 2d 236, 157 N. E. 2d 165, *affirmed*, 363 U. S. 144, *rehearing denied*, 364 U. S. 856	13
Edwards v. California, 314 U. S. 160	11
Federal Communications Commission v. WOKO, Inc., 329 U. S. 222	8
F. C. C. v. Broadcasting Service Organization, Inc., 337 U. S. 901	8

	PAGE
Ferguson v. Skrupa, 372 U. S. 726	10
Herb v. Pitcairn, 324 U. S. 117	7
Jett Bros. Co. v. City of Carrollton, 252 U. S. 1	7
Matter of Arroyo v. Moss, 295 N. Y. 754, 65 N. E. 2d 570	10
Matter of Barsky v. Board of Regents, 305 N. Y. 89, 111 N. E. 2d 222, *affirmed*, 347 U. S. 442	13
Matter of Brown v. Murphy, 34 Misc. 2d 151, 222 N.Y.S. 2d 423	12
Matter of College Point Wine & Liquor, Inc. v. O'Connell, 296 N. Y. 752, 70 N. E. 2d 554	10
Matter of Diocese of Rochester v. Planning Board of the Town of Brighton, 1 N. Y. 2d 508, 136 N. E. 2d 827	6
Matter of Elite Dairy Products v. Ten Eyck, 271 N. Y. 488, 3 N. E. 2d 606	10
Matter of Graffenberg Dairy v. DuMond, 278 App. Div. 428, 106 N.Y.S. 2d 1	8
Matter of Oseroff v. Cantor, 16 N. Y. 2d 924, 212 N. E. 2d 435	10
Matter of Perpente v. Moss, 293 N. Y. 325, 56 N. E. 2d 726	12
Matter of Sabel v. Hults, 9 N. Y. 2d 987, 176 N. E. 2d 513	10
Maurer v. Hamilton, 309 U. S. 598	11
Mester v. United States, 332 U. S. 749	8
People v. Duell, 1 N. Y. 2d 132, 134 N. E. 2d 106	9
People v. Hawker, 152 N. Y. 234, 46 N. E. 607, *affirmed*, 170 U. S. 189	13
Reitz v. Mealey, 314 U. S. 33	9
Schware v. Board of Examiners, 353 U. S. 232	13

PAGE

South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177 11
Whitney v. California, 274 U. S. 357 7
Wieman v. Updegraff, 344 U. S. 183 13
Williams v. Fears, 179 U. S. 270 11
Wilson v. Cook, 327 U. S. 474 7

STATUTES

New York Vehicle and Traffic Law § 392 9
New York Vehicle and Traffic Law § 501(1)(a) ..3, 4, 6, 11
New York Vehicle and Traffic Law § 510(c)(3) 4, 5, 6
United States Code, Title 28, § 1257(2) 2, 5, 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1298

REUBEN KEMP, JR.,

Appellant,

against

WILLIAM S. HULTS, as Commissioner of the Department of Motor Vehicles of the State of New York,

Appellee.

MOTION TO DISMISS OR AFFIRM

The appellee, Commissioner of the Department of Motor Vehicles, of the State of New York, moves that this appeal be dismissed or, in the alternative, that the final judgment of the Court of Appeals of New York State, as amended, be affirmed.

Opinions Below

The opinions of the New York State Court of Appeals dated March 17, 1966 are reported at 17 N. Y. 2d 191 and appear as Appendix A to appellant's jurisdictional statement. The order amending the remittitur of the New York Court of Appeals is not yet reported but appears at page 2 of the jurisdictional statement.

Contrary to appellant's statement, the court of original jurisdiction, the Supreme Court of the State of New York,

County of New York, did write an opinion which is unreported but appears in the Record on Appeal in the state courts at pages 4-5.

Jurisdiction

Appellant seeks to invoke the jurisdiction of this Court under United States Code, Title 28, § 1257(2).

Questions Presented

Does this Court have jurisdiction to hear this appeal under 28 U.S.C. § 1257(2)?

Was the appellant deprived of any rights under the Constitution when the appellee rejected his application for a motor vehicle operator's license where, in the application, the appellant failed to divulge his entire record of convictions as required?

Was the appellant deprived of any rights under the Constitution when the appellee rejected his application for a motor vehicle operator's license, in view of appellant's persistent disregard of the law, particularly the propensity for crimes of violence as demonstrative of his lack of fitness to operate a motor vehicle with due regard for the safety of others?

Statement

On or about January 21, 1965 the appellant applied to the appellee, Commissioner of the New York State Department of Motor Vehicles, for a chauffeur's license. In response to Question 13 on the application form, which asks applicants to state their entire record of crimes, infractions or offenses, the appellant responded that he had been previously convicted of the crime of Assault (19).*

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* Numbers in parentheses, unless otherwise indicated, refer to pages in the Record on Appeal in the New York Court of Appeals.

However, a routine investigation revealed that petitioner had failed to divulge a 1947 conviction for the crime of Murder in Mississippi, as well as other arrests and convictions dating back to 1940 (20-25). Moreover, appellant was asked to complete a form listing all felonies and all misdemeanors where the sentence was over sixty dollars, sixty days or probation. On this form (26), dated February 24, 1965, appellant again disclosed only the 1962 conviction for assault in New York and again did not divulge any facts relating to his criminal record outside New York. Appellant also stated on this form that he needed a license because the mechanic's union required one and it would enable him to get a better job. By letter dated April 5, 1965 the appellee denied appellant's application for a chauffeur's license (29). Upon appellant's request, this action was referred to the Board of Appeals and Review of the Department of Motor Vehicles and, upon that Board's recommendation, concurred in by the appellee, the denial was adhered to by letter dated April 23, 1965 (40). No judicial proceeding to review this administrative action was instituted.

Meanwhile, on April 12, 1965 appellant filed another application for a license, this time for an operator's license, and, for the first time, divulged in this application a previous conviction for murder in addition to an assault conviction (31). Again appellant did not disclose a 1940 conviction for burglary besides a 1942 conviction for trespassing (39). Accompanying this application, appellant filed a statement which, referring only to the assault and murder convictions, stated that appellant was not on parole and needed a license because an automobile would help him in his part-time job as a cosmetic salesman (32-33). This application was denied on June 11, 1965 (42), the appellee concluding that the appellant was not "at the present time" a fit person to have a license to operate a motor vehicle within the meaning of New York Vehicle and Traffic Law § 501(1)(a) because of appellant's disre-

gard for the law "especially evidenced" by the convictions for murder and assault which "indicate a lack of respect and consideration for the rights and personal safety of other people" (44).

By petition dated June 16, 1965, appellant instituted a proceeding under New York Civil Practice Law and Rules, Article 78, to review the appellee's determination denying the operator's license (7-11). The appellant made no allegation that the appellee's determination was an abuse of discretion or arbitrary but claimed instead only that New York Motor Vehicle Law § 510(c)(3) was unconstitutional for various reasons if it were construed to empower appellee to withhold a license for conviction of a crime not connected with the physical operation of a motor vehicle. There was no allegation in the petition that the delegation in New York Vehicle and Traffic Law § 501(1)(a) to the appellee of the power to determine fitness violates the Constitution.

In a decision dated July 23, 1965 the Supreme Court, New York County (DICKENS, J.) dismissed the petition, holding that the petition was defective under New York Civil Practice Law and Rules, Article 78 and that the appellee's refusal of a license "based upon [appellant's] general 'disregard for the law', as indicative of his lack of demonstrated fitness, and as evidenced by his prior criminal record and otherwise, was amply justified as a matter of law and discretion" and that the appellee "might well have also considered [appellant's] false statements made on the very license applications herein in determining his fitness to operate a motor vehicle on our public highway" (4-5). This decision was unanimously affirmed without opinion by the Appellate Division of the Supreme Court, First Department, by order dated November 16, 1965 (48-49). 24 A. D. 2d 934, —— N.Y.S. 2d ——.

On appeal to the New York Court of Appeals, the majority of that Court held that the failure of the appellant

to disclose his entire criminal record on the license application forms was sufficient justification for the denial of the present application for a license. Appellant then moved to have the remittitur of the Court of Appeals amended to indicate which constitutional questions that Court had passed upon. The Court of Appeals stated clearly in its order amending the remittitur that it had passed only upon the contention that it violated appellant's constitutional rights to deny him a license "for reasons not directly related to his ability to operate a motor vehicle —e.g., for not disclosing his entire record of convictions" on his applications. By motion returnable May 31, 1966 the appellant has sought an additional amendment of the remittitur of the New York Court of Appeals. Any decision on such motion cannot, of course, affect the status of the instant appeal or the issues presented by the case in the posture in which appellant chose to bring it to this Court.

POINT I

This Court lacks jurisdiction under 28 U.S.C. § 1257(2) since the decision of the New York Court of Appeals did not sustain the validity of a state statute against a constitutional attack.

In the petition by which this proceeding was instituted, appellant urged that New York Vehicle and Traffic Law § 510(c)(3) was invalid as an abridgement of his rights under the Constitution, if it were construed to empower the appellee to deny him a license under the circumstances of this case. This section, dealing with license revocations, was obviously not so construed either by appellee or by the New York courts, although appellee did argue in the state courts, *inter alia,* that this section implicitly supported his determination as a matter of discretion. However, the appellee did not rest his determination on this

section (43-45) and the Court of Appeals made no mention of it in any of its opinions.

The only other possible state statute the constitutionality of which could be involved here is New York Vehicle and Traffic Law § 501(1)(a). The petition in the New York Supreme Court (7-11) makes no mention of this section and appellant has never challenged the validity of this general licensing statute. On the contrary, appellant insisted in the state courts that he was *not* challenging the validity of § 501(1)(a). Indeed, it was necessary for appellant to maintain such a position because, under New York law, a litigant cannot in the same proceeding attempt to compel the issuance of a license and challenge the constitutionality of the licensing statute. *Matter of Diocese of Rochester* v. *Planning Board of the Town of Brighton,* 1 N. Y. 2d 508, 519-520, 136 N. E. 2d 827, 832.

Thus, appellant claimed only that the appellee had imposed invalid conditions in administering a concededly valid statute. And the Court of Appeals simply decided that, whatever the scope of the appellee's power to determine fitness under § 501(1)(a), appellee could not be mandated by the courts to issue a license on the basis of applications which concealed part of the information requested. The fact that the Court decided that appellant's constitutional rights were not violated by the rejection of such an application does not mean that the constitutionality of the statute was either reached or decided upon. Indeed, appellant's motion to amend the remittitur specifically requested the Court of Appeals to certify that it had passed upon and sustained the validity of §§ 501(1)(a) and 510(c)(3) and the Court declined to do so.

Under these circumstances, appellant has failed to establish that this Court has jurisdiction under 28 U.S.C. § 1257 (2). On the contrary, it has been consistently held in this Court that a challenge to the constitutionality of the ex-

ercise of authority under a statute whose validity is not attacked, as in this case, is insufficient to support appellate jurisdiction in this Court. *Wilson* v. *Cook*, 327 U. S. 474; *Jett Bros. Co.* v. *City of Carrollton*, 252 U. S. 1.

POINT II

Appellee's rejection of the appellant's application for a driver's license does not raise a substantial federal question.

A.

Although appellant's jurisdictional statement purports to raise eight separate questions, it is apparent, both from the majority opinions in the New York Court of Appeals and from that Court's order amending its remittitur, that the only question which was reached and decided below was whether appellant's constitutional rights were violated when the appellee rejected his license application which contained concealments amounting to false statements. The Court of Appeals held only that such a rejection did not violate appellant's rights. The Court considered appellee's broad powers to include the power to reject a license application containing false statements. Accordingly, this is the only question which can be properly raised by appellant in seeking review by this Court. See, *e.g.*, *Whitney* v. *California*, 274 U. S. 357; *Herb* v. *Pitcairn*, 324 U. S. 117.*

Thus, the instant proceeding as passed upon by the New York courts does not involve the power of a state to deny

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* Special mention should be made of appellant's reference to bill of attainder in his jurisdictional statement (p. 4). This contention was not mentioned in the petition by which the proceeding in the state courts was initiated and was never either briefed or argued in the New York courts. Appellant attempted to inject it into the case for the first time in his reply brief in the New York Court of Appeals but appellee pointed out that this belated contention was not available to appellant and the Court of Appeals properly made no reference to it.

a driver's license to convicted felons, whether or not their convictions arose directly from the operation of a motor vehicle. Nor does it involve the question of whether or not the criminal record of this particular appellant was sufficient cause to deny him a license. As the appellee argued and as the court of orginal jurisdiction held, the petition totally failed as a matter of New York law properly to raise the factual question of whether the appellee's action had been arbitrary or that appellee had abused his discretion. See *Matter of Graffenberg Dairy* v. *DuMond*, 278 App. Div. 428, 106 N.Y.S. 2d 1. Likewise, this case does not involve the question of whether or not the particular false statements made by appellant were sufficient as a factual matter to justify the appellee's rejection of the application. Since the appellant failed to make sufficient allegations to question the appellee's determination as a factual matter, the question which the Court of Appeals decided was the pure question of the power of the appellee to reject an application containing false statements and that is the only question upon which the appellant can properly seek review in this Court. This, we submit, is not a substantial federal question for plenary review by this Court. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 222, 227; *Mester* v. *United States*, 332 U. S. 749; *F.C.C.* v. *Broadcasting Service Organization, Inc.*, 337 U. S. 901.

B.

Whether a motor vehicle license is considered a right or a privilege, the power of the states to regulate the use of the highways as an adjunct of the police power has never seriously been questioned and is not disputed by the appellant. As the New York Court of Appeals has stated, "The underlying purpose of all legislation relating to motor vehicle traffic is the regulation of such traffic for the protection and safety of the public at large. . . . The licensing system is the keystone of all legislative safeguards deemed

necessary to protect the public against death and mutilation." *People* v. *Duell,* 1 N. Y. 2d 132, 134 N. E. 2d 106, 108. The natural incident of the undisputed power to require licenses and to condition the granting of such licenses upon an applicant's meeting certain standards is the necessity for obtaining information relative to these standards. The ability to administer standards to protect the health and safety of the public depends upon the accuracy and reliability of the information available to the administrative agency. Thus, it is a misdemeanor in New York to make intentional false statements on an application for a motor vehicle operator's license. New York Vehicle and Traffic Law § 392.

In this context, the rejection of appellant's application is clearly justifiable as a necessary incident of the police power to license, whether or not the false statements are directly related to appellant's physical ability to drive as such. Indeed other barriers not related to an individual's physical ability to drive as such—*e.g.,* minimum age requirements and financial security laws are common prerequisites to licenses to operate a motor vehicle. As this Court has held, the police power in this area is so broad that "Any appropriate means adopted by the states to insure competence and care on the part of its licensees and to protect others using the highways is consonant with due process." *Reitz* v. *Mealey,* 314 U. S. 33, 36.

Even the most stringent standards of due process do not require that a license be issued on the basis of an application which contains false statements. Thus, the New York Court of Appeals refused in this case to issue an order pursuant to New York Civil Practice Law and Rules Article 78 compelling the issuance of a license on the basis of the appellant's applications. Where a rejected applicant such as the appellant seeks to compel the issuance of a license, the burden imposed upon him under New York law is to establish "as a matter of law, that *no* valid ground" exists

for the denial of a license. *Matter of Elite Dairy Products* v. *Ten Eyck*, 271 N. Y. 488, 493, 3 N. E. 2d 606, 608. In cases involving all sorts of licensed activities the Court of Appeals has refused to compel an administrative body or officer to issue a license where the application contains false statements. See, *e.g.*, *Matter of Oseroff* v. *Cantor*, 16 N. Y. 2d 924, 212 N. E. 2d 435; *Matter of Sabel* v. *Hults*, 9 N. Y. 2d 987, 176 N. E. 2d 513; *Matter of College Point Wine & Liquor, Inc.* v. *O'Connell*, 296 N. Y. 752, 70 N. E. 2d 554; *Matter of Arroyo* v. *Moss*, 295 N. Y. 754, 65 N. E. 2d 570. However, the Court has frequently indicated, as it did in this case, that future applications containing full disclosure should not automatically be rejected solely for prior failures to disclose. In this regard it should be emphasized that the appellee has, from the beginning of this case, made it clear that the denial of a license was only for the "present time" (44, 45). Thus appellant's insinuation that he has been permanently deprived of the possibility of obtaining a driver's license is plainly without foundation either in law or in fact.

C.

Appellant's constitutional arguments are wholly untenable. This Court has consistently held that the power of the federal government to regulate interstate commerce does not disable the states from adopting and administering reasonable measures in the exercise of its police powers. See, *e.g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726; *California* v. *Zook*, 336 U. S. 725; *Clason* v. *Indiana*, 306 U. S. 439. In any event, the commerce clause argument is frivolous since the appellant concedes that he does not seek or need a license in order to engage in interstate commerce. His contention that "sooner or later" (Br. p. 13) he might wish to do so fails to establish any present burden whatsoever. And, even if it did, the denial of the application under review is, as we have shown, a necessary and valid incident to the execution and admin-

istration of the broad and pervasive power of the states to regulate the use of their highways. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *Maurer* v. *Hamilton*, 309 U. S. 598.

Similarly, appellant's claim that he has been denied privileges and immunities is without substance. In *Williams* v. *Fears*, 179 U. S. 270, this Court, recognizing the individual's right of locomotion, nevertheless upheld a tax on persons who hire out of state labor against a claim that it interfered with the rights of workers to move from one state to another. This Court based its conclusion on the fact that, despite the tax, the individual "is left free to come and go at pleasure", *id.* at p. 275. Similarly, in the case at bar, the rejection of a license application containing false statements does not interfere with the appellant's right of locomotion; he may still "come and go at pleasure" and travel all he wishes.

Edwards v. *California*, 314 U. S. 160, is totally inapposite to the instant case. In *Edwards* this Court simply held that a statute making it a misdemeanor to bring an indigent person into California was unconstitutional because it exerted an "intended and immediate" impact on interstate commerce *id.* at p. 174. No such intention or result can be found in the rejection of the appellant's application in the case at bar.

D.

Finally, although it is not in issue in this Court because it was not decided by the New York Court of Appeals, it is nevertheless clear that there is ample justification for the administrative rejection of appellant's application because of appellant's lack of demonstrated fitness within the meaning of New York Vehicle and Traffic Law § 501(1)(a). As noted above, *supra*, at pp. 5-7, this question does not go to the validity of the statute and, therefore, is insufficient to support jurisdiction by appeal in this Court.

In any event, the appellant's criminal record, in particular his convictions for murder and assault, revealed a lack of respect for the personal safety and rights of other individuals which, if transferred to the highways and the use of a motor vehicle, could make the appellant a menace to others using the highways.

After serving a prison term from 1947 to 1957 on the murder charge, the appellant, while on parole, assaulted someone with a knife and was incarcerated from November, 1961 until November, 1964. At the time of the instant application the appellant had been out of prison less than 6 months. Under these circumstances it was not unreasonable for the appellee to conclude that the potential risk involved, if appellant's disregard for the safety of others were to manifest itself on the highways, was too great *at that time* to support a conclusion of demonstrated fitness. As we have noted above, *supra,* at p. 10, appellant's fitness might be more persuasively demonstrated on a new and proper application at the present time might be significantly greater than it was only shortly after his release from prison. *Cf. Matter of Perpente* v. *Moss,* 293 N. Y. 325, 56 N. E. 2d 726; *Matter of Brown* v. *Murphy,* 34 Misc. 2d 151, 222 N.Y.S. 2d 423.

Certainly, there is a direct and immediate relationship between the proclivities of a person to obey the law and exhibit due regard for the rights and safety of other people and his disposition to operate a motor vehicle with similar regard for the rights of other drivers, rules of the road and laws designed to protect the safety of others using the highways. To arm a person so recently evidencing a propensity for crimes of violence with such a dangerous instrumentality as the motor vehicle is as indefensible as to arm him with a revolver under a license. The Constitution does not require that, before the State can act, a person such as the appellant, who has evidenced such a persistent disregard for the criminal law be permitted an

opportunity to show that he is not, despite this, an unfit person to be given the wheel of the automobile. The demands of safety on the highways require that the State not be compelled to take such a risk under the facts of this case.

This Court has frequently upheld decisions of the New York Court of Appeals which approved administrative determinations denying licenses to persons convicted of crimes. *Matter of Barsky* v. *Board of Regents*, 305 N. Y. 89, 111 N. E. 2d 222, *affirmed*, 347 U. S. 442; *People* v. *Hawker*, 152 N. Y. 234, 46 N. E. 607, *affirmed*, 170 U. S. 189; *DeVeau* v. *Braisted*, 5 N. Y. 2d 236, 157 N. E. 2d 165, *affirmed*, 363 U. S. 144, *rehearing denied*, 364 U. S. 856.

In this posture, reliance by appellant on such cases as *Schware* v. *Board of Examiners*, 353 U. S. 232, and *Wieman* v. *Updegraff*, 344 U. S. 183, is unfounded since the convictions for murder and assault with a deadly weapon appertain and are reasonable considerations in an administrative determination relating to an individual's fitness to operate a motor vehicle. Contrary to supporting appellant's position, *Schware* supports the appellee's denial of the application for a license since that case merely requires that, where an applicant is found unfit, the reasons for such a finding "must have a rational connection with the applicant's fitness", 353 U. S. 239, and, like *Wieman*, requires that fitness be tested by an applicant's conduct and not his beliefs. Appellant's conduct in persistently disregarding the penal laws, especially the penal laws against violence, has a direct and rational bearing upon his fitness to operate a motor vehicle with due regard for the rules of the road and the concomitant safety of others using the highways. This too adds further support to the appellee's determination. And this too is a legitimate incident of the police power and does not present a substantial federal question.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the appellee respectfully prays that the judgment of the New York Court of Appeals be affirmed or the appeal dismissed since there are no substantial federal questions.

Dated: New York, New York, June 3, 1966.

Respectfully submitted,

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